**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION 16**

**TYR ENERGY LOGISTICS**

**and** **Case 16-CA-262046**

**LUIS MIGUEL GARZA, an Individual**

**BRIEF SUBMITTED BY MICHAEL WALTER,**

**REPRESENTATIVE FOR TYR ENERGY LOGISTICS**

The charge was filed on June 22nd, 2020 by the General Counsel, the Respondent answered on October 11th, 2020. Pre-hearing Orders were issued by the Court on December 2nd, 2020. The hearing began on January 5th, 2021 and concluded on January 15th, 2021. The Court Ordered Briefs due by February 15th, 2021, this deadline was extended by Court Order, at the request of the General Council.

The Honorable Judge, Robert Giannasi presiding.
Mr. Mark Eskanazi, Court Deputy.
Mr. David Molinaro, Court Reporter.
Mr. Bryan Dooley and Mr. Phillip Melton, for the General Council.
Mr. Michael Walter, representative for TYR Energy Logistics.

## BACKGROUND

## COMPLAINT AND ANSWERS

**1.**

ALLEGATION: The charge in this proceeding was filed by the Charging Party on June 22, 2020, and a copy was served on Respondent by U.S. Mail on June 23, 2020.

ANSWER: Respondent agrees that: The charge in this proceeding was filed by the Charging Party on June 22, 2020, and a copy was served on Respondent by U.S. Mail on June 23, 2020. [GC Exhibit 1]

**2.**

ALLEGATION: At all material times, Respondent has been a limited liability company with an office and place of business in Corpus Christi, Texas (Respondent's facility) and has been engaged in the business of loading rail cars with refined products including gasoline and diesel.

ANSWER: Respondent agrees with that at all material times, Respondent has been a limited liability company with an office and place of business in Corpus Christi, Texas (Respondent's facility) and has been engaged in the business of loading rail cars with refined products including gasoline and diesel. [GC Exhibit 1]

**3.**

ALLEGATION: In conducting its operations in the 12-month period ending July 7, 2020, Respondent provided service valued in excess of $50,000 to customers directly outside the State of Texas.

ANSWER: Respondent agrees that its operations in the 12-month period ending July 7, 2020, Respondent provided service valued in excess of $50,000 to customers directly outside the State of Texas. [GC Exhibit 1]

**4.**

ALLEGATION: At all material times, Respondent has been an employer engaged in commerce within the Meaning of Section 2(2), (6), and (7) of the Act.

ANSWER: Respondent agrees that at all material times, Respondent has been an employer engaged in commerce within the Meaning of Section 2(2), (6), and (7) of the Act. [GC Exhibit 1]

**5.**

ALLEGATION: At all material times, the following individuals held the positions set forth opposite their names and have been supervisors of

Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

| | |
|---|---|
| Michael Walter | Chief Operating Officer |
| Mark Henry | Operations Manager |

ANSWER: Respondent agrees that at all material times, the following individuals held the positions set forth opposite their names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

| | |
|---|---|
| Michael Walter | Chief Operating Officer |
| Mark Henry | Operations Manager [GC Exhibit 1] |

**8. [sic]**

ALLEGATION: (a) About June 1, 2020, the Charging Party engaged in concerted activities for the purposes of mutual aid and protection by discussing concerns about the safety of working conditions with other employees and reporting those shared concerns to management.

(b) About June 1, 2020, Respondent terminated the Charging Party.

(c) Respondent engaged in the conduct described above in paragraph 8(b) because the Charging Party engaged in the conduct described above in paragraph 8(a), and to discourage its employees from engaging in protected concerted activity.

ANSWER: (a) The Respondent denies the allegation that: about June 1, 2020, the Charging Party engaged in concerted activities for the purposes of mutual aid and protection by discussing concerns about the safety of working conditions with other employees and reporting those shared concerns to management. The Respondent was unaware that the Charging Party was discussing concerns about the safety of working conditions with other employees and reporting those shared concerns to management until the filing of this action. The Respondent's management professionally listened to the Charging Party's concerns and the Respondent provided the Charging Party with all written company policies that were requested by the Charging Party. During this time the lightning alert, which was the Charging Party's stated concern, was cleared in accordance with company policy and all employees were given clearance to return to their respective work locations. The return-to-work location was a lawful and reasonable order. The Charging Party was asked not once but twice to return to his work location. The Charging Party refused to return to his work

location on both occasions. The Charging Party's refusal undermines his supervisors' level of respect and ability to manage. In summary, the Charging Party's refusal to return to work is what precipitated the Charging Party's employment to be terminated due to the Charging Party's blatant insubordination. This level of insubordination is not and cannot be considered a protected concerted activity. In addition, this level of insubordination can create a hazardous work environment for other employees placing their safety and wellbeing at risk.

(b) The Respondent agrees that: About June 1, 2020, Respondent terminated the Charging Party. The Charging Party was terminated for blatant insubordination and NOT from engaging in protected concerted activity, as outlined in ANSWER 8(a)[sic] above. The Charging Party agreed in writing as a condition of employment accordingly either the company or the Charging Party can terminate the employment relationship at-will, at any time, with or without cause and with or without advanced notice.

(c) The Respondent denies each and every allegation that: Respondent engaged in the conduct described above in paragraph 8(b) because the Charging Party engaged in the conduct described above in paragraph 8(a), and

to discourage its employees from engaging in protected concerted activity. [GC Exhibit 1]

**9. [sic]**

ALLEGATION: By the conduct described above in paragraph 8, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

ANSWER: The Respondent denies the allegation that: By the conduct described above in paragraph 8, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act. [GC Exhibit 1]

**10. [sic]**

ALLEGATION: The unfair labor practices of Respondent described above affect commerce withing the meaning of Section 2(6) and (7) of the Act.

ANSWER: The Respondent denies the allegation that: The unfair labor practices of Respondent described above affect commerce withing the meaning of Section 2(6) and (7) of the Act. [GC Exhibit 1]

## PROTECTED CONCERTED ACTIVITY

**"**Protected Concerted Activity is a legal term used in labor polity to define employee protection against employer retaliation in the United States. It is a legal principle under the subject of the freedom of association. The term defines the activities workers may partake in without fear of employer retaliation. In countries where there is relative robust employee dismissal protection, the protection of protected concerted activity is less of a distinct legal issue. In liberal market societies like the United States, where it is comparatively easy for an employer to fire an employee, the issue of protected concerted activity has become an important employment protection. The National Labor Relations Act, the main labor policy governing labor relations in the United States, defines concerted activity in Section 7.

*Section 7 – Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their won choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection…*[1]

Generally speaking, there is protected concerted activity ***when two or more employees act together*** to improve their terms and conditions of employment, although it is (on rare occasions) possible for conduct to be so egregious that it becomes unprotected.[2] Employees have a right to advocate in this manner even where there is no union involved.[3]

At times, protected concerted activity has extended to individual employees; for example, when an employee speaks individually to his or her employer on behalf of him or herself and one or more co-workers about improving workplace conditions. An individual employee who seeks to enforce a collective bargaining agreement will generally be deemed to be engaged in concerted activity.[4] On the other hand, an employee who acts as a "whistleblower" may or may not be engaging in concerted activity; if the complaint is entirely individual and the employee has not discussed it with co-workers, it is unlikely to be protected by the National Labor Relations Act (though it may well be protected under some other public policy).[5]

The Act does not limit the manner, time, or place in which employees can engage in concerted activity. Consequently, in recent years, the General Counsel

of the National Labor Relations Board has often taken the position that employee conversations about common workplace issues which make use of social media such as Facebook and Twitter are protected against retaliation.[6]"[7]

REFERENCES


1. Labor Management Relations Act, 29 U.S.C. Sec. 157.
2. Atlantic Steel, 245 N.L.R.B. 814, 816 (1979).
3. Labor Board v. Washington Aluminum Co., 370 U.S. 9, 14 (1962).
4. NLRB v. City Disposal Systems, 465 U.S. 822 (1984).
5. See Meyers Industries, Inc., 281 N.L.R.B. 882 (1986).
6. See Report of the Acting General Counsel Concerning Social Media Cases Archived 2013-02-24 at the Wayback Machine, OM 12-31 (Jan. 24, 2012)
7. https://en.wikipedia.org/w/index.php?title=Protected_concerted_activity&oldid=962928572


**EVIDENCE**

The entire theory of the General Council is that a weather-related hazard was present and that Luis Garza felt threatened by the hazard. In order for there to be protected concerted activity by Luis Garza, there first must be a relevant issue to discuss with management and/or supervisors. In this case, there is none.

Luis Garza and supporting witnesses all testified that they were aware of the weather/lightning hazards when they reported for work. In addition, they testified the hazard was addressed at the employee held mandatory safety meeting that morning.

The company safety policy concerning this issue can be found in the TYR Energy Employee Handbook Section 5: Safety in the Workplace, Each Employee's

Responsibility pg. 47, subsection 8. which states, “Comply with OSHA standards and/or applicable state job safety and health standards as written in our safety procedures manual.”. [The Court requested that the General Counsel provide a copy of TYR Energy Logistics’ Employee Handbook.]

Luis Garza acknowledged, by signature, that he had read and understood the TYR Energy Employee Handbook. [GC Exhibit 10]

The General Council introduced the OSHA fact sheet as discussed in the employee handbook concerning lightning safety when working outdoors. Luis Garza testified that this is the procedure he followed. [GC Exhibit 3]

Luis Garza and his supporting witnesses testified that at no time did a company manager or supervisor ask them to ignore the policies or procedures.

In summary, Luis Garza and his supporting witnesses testified that they were aware of the procedures, followed the procedures and were not asked to do anything to the contrary by anyone.

Common sense would indicate that Luis Garza could not have engaged in protected activity since there was no safety violations to be discussed with his supervisors.

In addition, Luis Garza testified that his interactions with Mr. Henry, his supervisor, was solo and that no other employees were present. Therefore, Luis Garza's activities were only related to himself and not to a group.

What is considered "protected concerted activities" by workers under the NLRA is defined in *Alstate Maintenance, 367 NLRB No. 68 (January 11, 2019),* which requires two or more employees to act together. In doing so, the board expressively overturned *Worldmark by Wyndham 365 NLRB 765 (2011)* which previously held that a single employee who gripes is per se engaged in protected activities.

**IN SUPPORT OF INSUBORDINATION TERMINATION**

As per the testimony of Michael Walter, Luis Garza was terminated for insubordination due to his refusal to follow his supervisor's orders to return to his work location, not only once, but twice. ["Affidavit GC AFF.16-CA-262046.Michael Walter AFF.PDF]

There was no hazard present, that would have stopped Luis Garza from returning to his work location.

Mr. Walter testified that insubordination in itself is a safety hazard in any work location.

Luis Garza, by signature, agreed that his relationship with the company was that of an “At Will Employee”. [GC Exhibit 10]

Luis Garza’s unemployment benefits were denied and listed the cause of termination as insubordination. [GC Exhibit 10]

**SUMMARY**

There was no protected concerted activity undertaken by Luis Garza. Luis Garza was lawfully terminated for insubordination and as outlined under Texas “at will” employment law and not protected concerted activity as alleged.

General Counsel has failed to prove that there was an issue at any time that would have caused Mr. Garza to engage in a protected concerted act.

At no time has the General Counsel proven that Mr. Garza was acting on behalf of a group in a protected concerted act.

This was simply a “gripe” of Mr. Garza’s due to the fact that the weather conditions were less than perfect to be working outside.

Michael Walter
Representative
TYR Energy Logistics, LLC